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Nos. 14-614, 14-623

In the Supreme Court of the United States

W. KEVIN HUGHES, *et al.*,
Petitioners,

v.

TALEN ENERGY MARKETING, LLC
(F/K/A PPL ENERGYPLUS, LLC), *et al.*,
Respondents,

CPV MARYLAND, LLC,
Petitioner,

v.

TALEN ENERGY MARKETING, LLC
(F/K/A PPL ENERGYPLUS, LLC), *et al.*,
Respondents,

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF

Pursuant to Rule 25.6, respondents submit this supplemental brief to address this Court's recent decision in *FERC v. Electric Power Supply Association*, Nos. 14-840 & 14-841 (U.S. Jan. 25, 2016) ("*EPSA*"). In *EPSA*, this Court upheld FERC's regulation of wholesale demand response, reaffirmed FERC's exclusive authority over wholesale auctions and wholesale transactions, and observed that a state's effort to "oversee offers, made in a wholesale market operator's auction, ... would be preempted." *EPSA*, slip op. 26. The *EPSA* decision bolsters the conclusion reached by every federal judge to consider the matter that Maryland's attempt to dictate what a wholesale seller will receive for or in connection with its wholesale sales of electricity in a wholesale-market operator's auction is preempted. Indeed, Maryland's Generation Order does precisely what *EPSA* reiterates that FERC alone has the power to do—namely, regulate "transactions occurring on the wholesale market." *Id.* at 19.

1. The principal question presented in *EPSA* was whether FERC had jurisdiction to issue a rule regulating "wholesale demand response," a practice whereby wholesale-market operators such as PJM Interconnection, LLC ("PJM") pay consumers for commitments to reduce their electricity consumption. *Id.* at 1-2. In holding that FERC has jurisdiction to regulate that practice, the Court began by emphasizing FERC's broad statutory grant of authority "to regulate the interstate wholesale market for electricity—both wholesale rates and the panoply of rules and practices affecting them." *Id.* at 14. The

Court concluded that FERC's wholesale demand response rule falls comfortably within that statutory grant because the "Rule addresses—and addresses only—transactions occurring on the wholesale market." *Id.* at 19. The Court then found that the rule does not infringe on the states' authority over retail sales because it does not "specif[y] terms of sale at retail—which is a job for the States alone." *Id.* at 18. Finally, the Court emphasized that FERC's rule serves the interests of the FPA by avoiding a regulatory gap: Only FERC could regulate wholesale transactions involving wholesale-market operators because state efforts to oversee such efforts "would be preempted." *Id.* at 26.

2. The same reasoning compels the conclusion that the FPA preempts Maryland's effort to dictate what rate CPV Maryland, LLC ("CPV") will receive for or in connection with its wholesale sales to PJM. Like FERC's demand response rule, Maryland's order is plainly focused on wholesale transactions and practices directly affecting them. The pricing contracts that the order creates guarantee payments to a *wholesale* seller in connection with its *wholesale* sales of energy and capacity *to PJM* in its *wholesale* market. Pet.App.89a. Indeed, petitioners effectively concede as much with their belated contention that the contracts are subject to FERC review. *See, e.g.*, Md.Br.26-31; CPV.Br.28. And there can be no serious argument to the contrary. For each unit of energy or capacity that CPV sells to PJM at wholesale, the contracts require the counter-parties to ensure that CPV receives a rate "different and more enduring than" the rate produced by PJM's FERC-approved auction mechanism. Md.Br.3; *see also, e.g.*, JA364-65,

JA366-67, JA388, JA389-90. Maryland's order thus not only is confined to wholesale transactions, but also "specifies terms of sale at [wholesale]—which is a job for [FERC] alone." *EPSA*, slip. op. 18.

Because the order and the contracts focus on CPV's sales to the wholesale-market operator and what CPV receives in connection with those sales, the order cannot be characterized as regulating matters within the states' reserved jurisdiction under the FPA. FERC's effort to provide appropriate price signals to both new and existing generators participating in PJM auctions is plainly confined to the wholesale markets. Indeed, while FERC's effort in *EPSA* allowed large retail customers to participate in wholesale auctions, FERC's regulatory efforts here are exclusively directed to sales and purchases for resale. But Maryland's effort to ensure that CPV receives different amounts in connection with its sales to PJM is just as focused on the wholesale market, which is a fatal problem under both *EPSA* and broader principles of preemption. As the Court concluded in *EPSA*, "[a]ny effort" by states to "oversee offers, made in a wholesale market operator's auction, that help to set wholesale prices ... would be preempted." *Id.* at 26.

3. As *EPSA* also confirms, Maryland cannot avoid preemption by compelling third parties to make side payments to CPV in connection with its wholesale sales to PJM, rather than trying to dictate what PJM itself must pay CPV for those sales (something that even petitioners must concede Maryland could not do). "The FPA 'leaves no room either for direct state regulation of the prices of interstate wholesales' or for regulation that 'would indirectly achieve the same

result.'" *Id.* (quoting *N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U. S. 84, 91 (1963)).

That result flows not just from *EPSA*, but from the plain language of the FPA itself. What matters under the FPA is whether a state is trying to dictate the price that a wholesale seller will "receive[] ... for or in connection with" interstate wholesale sales. 16 U.S.C. §824d(a). If so, whether the state does so directly or indirectly is beside the point; either way, its actions are plainly preempted. There is no comparable language concerning the states' reserved power over retail rates and generation, which is why the Court could take a narrow view of what constituted the regulation of retail rates in *EPSA*. As to FERC's exclusive authority, by contrast, Congress has specified that FERC's authority extends not just to setting rates, but to regulating "[a]ll rates and charges *made, demanded, or received* by any public utility for or in connection with" interstate wholesale sales. *Id.* (emphasis added).

EPSA also underscores that FERC's exclusive authority extends not only to what is received in connection with sales for resale, but also to practices directly affecting wholesale sales. And while *EPSA* queried whether any practice could "affect[] wholesale prices" more "directly" than "[c]ompensation for demand response sales" to a wholesale-market operator, *EPSA*, slip op. 17, the specification of what a wholesale seller receives in connection with sales directly *to PJM* is a practice with an equally direct effect. *See* U.S.Br.20-24. That practice not only alters the rate received for or in connection with the sale to which the payment is attached, but also alters the

bidding behavior of wholesale sellers in a way that alters the rate received by *all* participants in the PJM action. *See, e.g.*, Economists Br.6-15; Pet.App.94a.

4. *EPSA* not only holds that FERC's wholesale authority is broad, but also makes clear that the states' authority is at its nadir when it comes to the regulation of wholesale transactions involving auctions run by wholesale-market operators. The Court buttressed its conclusion that FERC's authority extended to wholesale demand response with its observation that states could not reach those transactions. As the Court observed: "A state could not oversee offers, made in a wholesale market operator's auction, that help to set wholesale rates." *EPSA*, slip op. 26. Thus, states could not, for example, attempt to set the rates for wholesale demand response transactions or provide additional payments to demand response providers in connection with their offers of demand response to a wholesale-market operator like PJM. The Court broadly determined that "[a]ny effort of that kind would be preempted." *Id.* And states have no more business dictating additional payments for generators, as opposed to demand response providers, when it comes to their sales *to PJM*.

Unlike in *EPSA*, moreover, there is no risk of a regulatory gap in this case because FERC actively regulates PJM's energy and capacity auctions and deems the prevailing prices on those auctions to be "just and reasonable." There are, however, grave risks of state intrusion into an exclusively federal field and state frustration of FERC's policies with respect to what a generator should receive for or in connection

with its sales to PJM. While *EPSA* emphasized that FERC itself had accommodated states that wanted to opt out of wholesale demand response, here, FERC is on record that Maryland's effort positively frustrates FERC's regulatory objectives. *See* U.S.Br.24-28. It could hardly be otherwise. It is one thing for a state to keep in-state generators off of the wholesale markets or to pursue traditional bilateral contracts. But a state direction that a generator bid its energy and capacity into PJM and still receive a price for that energy and capacity different from that provided by the federally approved rules is plainly preempted.

5. That Maryland's order frustrates federal policy is unsurprising. As with FERC's efforts in *EPSA*, Maryland's "justifications for regulating" what CPV receives for or in connection with its wholesale sales to PJM were "about ... improving the wholesale market." *EPSA*, slip op. 20. But while the FPA quite plainly authorizes FERC to "improv[e] the wholesale market," that is not part of the states' responsibility. CPV and Maryland recognized as much when they tried unsuccessfully to get FERC to change its rules to give new generators the same kind of long-term pricing guarantee that the state's order provides. *See PJM Interconnection, L.L.C.*, 126 FERC ¶61,275, at ¶¶146, 149 (2009). Dissatisfaction with FERC's regulation of the wholesale market is ample reason to ask FERC to change its policy, but it is no excuse for a state taking matters into its own hands. *But cf.* JA655 (testimony from former PSC chairman that there are "a million things ... wrong with" PJM's FERC-approved pricing model); JA478; JA492-93.

Yet Maryland's order not only provides the kind of pricing stability in connection with sales to PJM that FERC expressly rejected, but also is aimed at lowering the PJM auction rate for wholesale sales, *see* JA478; JA492; JA493, which is precisely why Maryland would pay its favored generator only for wholesale sales *to PJM*. Once again, Maryland is attempting to achieve its own conception of what would "improv[e] the wholesale market," which is FERC's responsibility under the FPA, not Maryland's. And the ultimate effect of Maryland's usurpation of FERC's power is to destabilize the balance that FERC considers essential to maintaining a reliable supply of wholesale electricity at just and reasonable rates. *See* U.S.Br.24-28.

Finally, recognizing Maryland's order as the clear intrusion on FERC's jurisdiction that it is poses no threat to "cooperative federalism" in the nation's energy markets. *EPSA*, slip op. 25. States have many means of incentivizing new generation without running afoul of FERC's exclusive jurisdiction over interstate wholesale sales—including opting out of the interstate wholesale market entirely and returning to the vertically integrated regime that many states still retain today. *See, e.g.*, Resp.Br.40; U.S.Br.18-19. States just cannot seek to incentivize new generation by dictating what a new generator will receive for or in connection with its interstate wholesale sales to a wholesale-market operator. That is hardly a novel, or even a particularly consequential, proposition. Instead, it follows ineluctably from the reality that the FPA grants FERC alone the power to "set the terms of transactions occurring in the organized wholesale markets." *EPSA*, slip op. 34. Because Maryland's

order is a blatant attempt to usurp that power, it is plainly preempted by the FPA.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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